all the legislation bearing on American banking a disposition to throw every possible safeguard around the rights and interests of general depositors, and to treat them all fairly, equitably, and impartially. The doctrine of the guaranty of all bank deposits has its advocates and also its opponents, but we have yet to hear of any voluntary public advocacy of guaranteeing a part of the general depositors to the exclusion of others, and securing that guaranty by a pledge of the bank's assets. Legislation looking to that end we apprehend would be quite as unpopular as it would be for a bank publicly to advertise the fact that it was indulging in the practice under the guise of an implied incidental power.

It is said however that the general depositor who is not secured is in no wise injured if at the time of the transaction the bank is solvent, because the bank's cash assets are thereby increased by the amount of the deposit. Appellees, however, are not in a position to urge this point, because the value of the securities pledged exceeded the amount of the deposit by several thousands of dollars. To be sure, if the securities pledged retained their value the excess would eventually return to the bank for the benefit of the other depositors; but if they did not retain their value they might never return and the secured depositor would thus participate in a greater proportion of the bank's assets than that to which it would otherwise be entitled. If the value of the pledged assets should fall below the amount of the deposit, the bank, in order to retain the deposit, might be compelled to make additional pledges and thus further deplete the assets to the prejudice of the other depositors.

Another inequitable feature is apparent in case the bank subsequently becomes insolvent, as happened here. In that event if the pledged assets are sufficient to pay the secured deposit, all the expenses of winding up the affairs of the bank are paid out of the unpledged assets and fall upon the unsecured depositors.

A bank's right to pledge its assets as security for some of its general depositors to the exclusion of others has constituted the basis for many legal controversies in this country, and as a result there is a diversity of judicial opinion. That diversity is due not alone to the differences of economic views but also to differences in the statutes involved. In those cases practically every phase of the question has been very ably discussed, and we deem it unnecessary to refer to them except to classify them with relation to the general facts and the

statutes there presented.[2] Appellees contend that the greater weight of authority upholds the pledge. However, a perusal of those decisions discloses that some are based upon statutes which expressly grant the power, and others upon statutes which contain provisions from which power may rightfully be inferred. Since none of those provisions is present in the Illinois statutes, what appears to be a majority of opinions supporting the pledge, in reality is not such a formidable array of authority on the question presented under the Illinois statutes. Some of the cases referred to deal with deposits of public money, and others deal with individual and corporate deposits other than public money, but we think the same principle applies to each. The power to pledge assets for the security of public money can not, under the decisions of our Supreme Court, be based upon any attribute of sovereignty on the part of the pledgee, but such power must be based upon an express or implied legislative grant. In the absence of an express grant of power, no power by implication should be permitted to prevail unless the facts presented render it reasonably necessary that such implication arise in order fully and fairly to effectuate the express powers granted. We are convinced that that condition does not exist here. Such an

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[2] Pledge to secure public funds valid by virtue of state statute: *Williams* v. *Hall*, 30 Ariz. 581, 249 Pac. 755 (1926); *Williams* v. *Earhart*, 34 Ariz. 565, 273 Pac. 728 (1929); **Button* v. *Sanguinetti*, 11 Pac. (2d) 1085, (Ariz. 1932); **Ark. La. Highway Improvement Dist.* v. *Taylor*, 6 S. W. (2d) 533, (Ark. 1928); **McGown* v. *Edwards*, 48 S. W. (2d) 558, (Ark. 1932); *First Nat. Bank* v. *Foss*, 96 Cal. App. 107, 273 Pac. 1085, (1928); **Wood* v. *Imperial Irr. Dist.*, 17 Pac. (2d) 128, (Cal. 1932); **Porter C. Canyon Co. Fire Ins. Co.*, 263 Pac. 632 (Idaho 1928); *Schornick* v. *Butler*, decided by the Supreme Court of Indiana, March 28, 1933. (This decision, however, reverses the decision on the same case originally handed down July 3, 1930, and published in 172 N. E. 181, in which it was held that a statute permitting depositories to pledge certain specified assets in lieu of personal or surety bonds given to secure deposits of public funds did not authorize them to assign or pledge other types of assets to secure the sureties on bonds given to secure the deposits. Since that decision was rendered, the personnel of the Supreme Court of Indiana has changed, and the only member who remains is one who dissented from the original decision.) **City of Louisville* v. *Fidelity & Columbia Trust Co.*, 54 S. W. (2d) 40, (Kentucky 1932. But see also *Comm. Bank and Trust Co.* v. *Cit. Trust Co.*, 156 S. W. 160, a 1913 Kentucky case decided prior to the 1932 statute and the leading one opposed to the granting of the right to pledge.) **Farmers' and Merchants' State Bank* v. *Consolidated School Dist.*, 219 N. W. 163, (Minn. 1928); *US Fidelity and Guaranty Co.* v. *Bassfield*, 148 Miss. 109, 114 So. 26 (1929); *Huntsville Trust Co.* v. *Noel*, 12 S. W. (2d) 751, (Mo. 1928); **Bliss* v. *Pathfinder Irr. Dist.*, 240 N. W. 291 (Neb. 1932); *Snider* v. *Fulton*, ... Ohio ..... (decided by the Court of Appeals of Lucas County, Ohio, Dec. 1932. See also *Ward* v. *Fulton*, 181 N. E. 815, a case decided by the Supreme Court of Ohio in 1932.) **Maryland Casualty Co.* v. *Board of County Com'rs.*, 260 Pac. 1112 (Okla. 1926); *Mothershead* v. *US Fidelity & Guaranty Co.*, 22 Fed. (2d) 644, (8th CCA, Okla. 1927); *City*

implication, viz., that the power to transfer specific assets to secure a general deposit is an incidental power "necessary to carry on the business of banking," is so inconsistent with equity and good conscience and is fraught with such wrongful possibilities that we are not willing to foist it upon the State of Illinois until its legislature or its courts have spoken clearly to that effect. That those bodies have the right if they choose to approve such policy is not denied, but we merely hold that they have not yet done so.

It is argued that inasmuch as money when deposited as a general deposit becomes immediately the property of the bank, and the relation of debtor and creditor thereupon arises, the bank therefore has an inherent right to deal with those deposits in the conduct of its business as it pleases. Personal and property rights are relative terms, and they can be exercised only so far as they do not conflict with the rights of

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of Portland v. *State Bank*, 214 Pac. 813 (Ore. 1923); **Foster* v. *City of Longview*, 26 S. W. (2d) 1059 (Tex. 1930); **Austin* v. *Lamar*, 26 S. W. (2d) 1062 (Tex. 1930); *Pottorff* v. *El Paso-Hudspeth Counties Road Dist. of Texas*, 62 Fed. (2d) 498 (CCA, 5th Circuit, 1933); *Pixton* v. *Perry*, 269 Pac. 114 (Utah 1928); **US Fidelity & Guaranty Co.* v. *Anderson*, 264 Pac. 1030 (Wyoming 1928).

* These cases hold variously that while the state involved does have its statute, that statute is to be very strictly construed, and not to be extended beyond its express terms, either as to type of securities to be pledged, or the funds to be protected, etc.

Pledge to secure public funds valid because not prohibited by statute: *Richards* v. *Osceola Bank*, 45 N. W. 294 (Iowa 1892); *Andrews* v. *Odebolt Sav. Bank*, 214 N. W. 559 (Iowa 1929); *French* v. *School Dist.*, 7 S. W. (2d) 415 (Mo. 1928); *Ainsworth* v. *Kruger*, 260 Pac. 1055 (Mont. 1927); *Bliss* v. *Mason*, 237 N. W. 581 (Neb. 1931); *Melaven* v. *Hunker*, 299 Pac. 1075 (N. M. 1931); *Page Trust Co.* v. *Rose*, 135 S. E. 795 (N. C. 1926); *Richmond County* v. *Page Trust Co.*, 142 S. E. 786 (a 1928 N. C. case holding pledge to secure private deposit also valid); *Grigsby* v. *Peoples' Bank*, 11 S. W. (2d) 673 (Tenn. 1929). See also *Citizens State Bank* v. *First Nat. Bank*, 157 Pac. 392, a 1916 Kansas case holding that a statute similar to the one construed in *Hirning* v. *Toohey*, *infra*, has reference only to pledge by bank already insolvent, and does not prevent even private pledge by solvent bank.

Pledge to secure public funds valid in accordance with general practice or public policy: *First American Bank & Trust Co.* v. *Palm Beach*, 117 So. 900 (Fla. 1928); *In re Bank of Spencerport*, 255 N. Y. S. 482 (1932). See also: *McFerson* v. *Nat'l. Surety Co.*, 212 Pac. 489 (Colo. 1923), giving no reason for holding such pledge valid; *State Bank of Commerce of Brockport* v. *Stone*, a case decided by the New York Court of Appeals, Feb. 28, 1933, holding that while a pledge to secure a private deposit is invalid, the receiver of an insolvent bank must return the amount of the deposit before he is entitled to the return of the pledged securities; and *Interstate Nat'l Bank* v. *Ferguson*, 30 Pac. 237 (Kan. 1892).

Pledge of securities invalid: *Carter* v. *Brock*, 110 So. 71 (La. 1926); *Divide County* v. *Baird*, 212 N. W. 236 (N. D. 1926); *Hirning* v. *Toohey*, 207 N. W. 462 (S. D. 1926); *Balt. & Ohio R. Co.* v. *Smith*, 56 Fed. (2d) 799, a decision by the Circuit Court of Appeals for the Third Circuit holding a pledge to secure a private deposit invalid.

others. Illinois banks by virtue of their charters have power to do general banking business, which includes the right to receive general deposits. To be sure such a bank owns its assets, and that term includes general deposits, but to say that such bank in the conduct of its business has an unrestricted right to use its assets as it pleases is going further, we think, than the law authorizes. Those who become depositors do so as the result of an express or implied invitation from the bank, and although the bank becomes the owner of the money deposited, it will not, in the absence of legislative authorization, be permitted to use it in such manner as to violate a general depositor's right to be treated fairly, equitably and impartially with all other general depositors.

There is another obstacle which we think defeats appellees' right to prevail in this action. In 1910, Illinois enacted what is known as its Commission Form of Government Act. Cahill's Illinois Revised Statutes, 1931, ch. 24, par. 323, *et seq.* Paragraph 374 deals with the deposit by the city treasurer of the city funds in certain banks. It specifically provides that

> "any such bank, before any such deposit is made therein, * * * shall * execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep and account for, and pay over said money. Said president of the council, the commissioner of accounts and finance and the treasurer, in the selection of any such depository bank, shall take into consideration the reputation and solvency thereof, and the sufficiency of the security offered by such bank."

That enactment expressly sets forth what an Illinois bank shall be authorized to do in order to secure a deposit of public funds of a city operating under the Illinois commission form of government, and no implication which is not clear will be permitted to strike down that express requirement. If prior to this enactment, as appellees contend, Illinois had committed itself to the policy of permitting assets to be pledged for the security of deposits, that fact would not prevent a change of that policy whenever the lawmaking authorities of Illinois might consider it expedient to make such change, and their reasons for so doing would not be reviewable by the courts.

Even if it be conceded that appellees have properly construed the Court's language in *Ward* v. *Johnson, supra,* then we say that section 51 of the Illinois Commission Form of

Government Act, (par. 374, ch. 24, *supra*) has superseded the doctrine announced by the Court in that case so far as the facts in the instant case are concerned.

We have refrained from discussing the authorities cited from other courts, because they deal with statutes other than, and different from, the Illinois statutes; or they deal with implied powers which we are convinced do not arise in the instant case, or with economic questions which no doubt were considered by the Illinois Legislature when paragraph 374, *supra*, was enacted, and with which we cannot be judicially concerned.

The question next arises whether section 51 of the Commission Form of Government Act has in any way been modified by subsequent legislation. On June 23, 1919, the "General Banking Act" of Illinois was enacted, and it became effective on December 1, 1920. Cahill's Illinois Revised Statutes, 1931, ch. 16(a). In that Act there is no express authority granting banks power to pledge, or prohibiting them from pledging, their assets for the security of deposits; but under the broad general powers therein granted to form banks and banking associations for the purpose of discount and deposit, buying and selling exchange, and doing a general banking business, it is contended by appellees that the same implications as announced in *Ward* v. *Johnson, supra,* continue to prevail, inasmuch as the general banking powers granted in the former enactments are not materially different from those contained in the Act of 1919.

Whether a statute has been repealed by implication is a question of legislative intention, and there are acknowledged rules for ascertaining that intention. Such repeals are not favored, and one statute will not be considered as repealing another statute by implication unless the later statute is positively repugnant to the former or is a plain substitute for it. The intent to repeal must very clearly appear. *United States* v. *Claflin,* 97 U. S. 546. Such repeals will not be indulged if there is any other reasonable construction. *Peck* v. *Elliot,* 79 Fed. 10; *Chicago, etc., R. Co.* v. *Doyle,* 258 Ill. 624. The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later and general act. *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487. The presumption is that the special act is intended to remain in force as an exception to the general act. *Rodgers* v.

United States, 185 U. S. 83; *Washington* v. *Miller*, 235 U. S. 422.

Under the circumstances of this case we think there was no intention on the part of the Illinois Legislature to repeal or modify the provisions of paragraph 374, *supra*, by the enactment of the General Banking Act in 1919. The former is a special act and deals with the powers of banks generally. The two are not to be considered as positively repugnant nor offensively inconsistent. It might well be that the Illinois Legislature had good and sufficient reasons for preferring bonds with sureties instead of assets of banks as security for the deposits of cities operating under the commission form of government. This it had a right to do if it so desired, and its reasons therefor cannot be questioned. Subsequent events of which we may fairly take judicial notice may be considered as having somewhat justified that choice.

Appellees urge our consideration of *Williams* v. *Earhart*, 34 Ariz. 565, 273 Pac. 728. In that case the receiver of a bank sued the state treasurer to recover collateral theretofore pledged and delivered by the bank to the treasurer to secure a deposit of public money. The pledge did not consist with the state statute, which provided that a bond with sureties should be given or that a deposit of interest-bearing bonds of the United States should be made with the state treasurer. The state of Arizona was the real beneficiary, and the Court, assuming without deciding that the taking of the pledge was contrary to law, held that the receiver might not repudiate the contract as against the interests of the beneficiary, the State, which was an innocent third party. The Court said:

> "We agree that security of the kind specified in the statute is the only kind the taking of which would exempt the state treasurer from liability on his official bond in case he deposited state money in a designated depository bank, but it by no means necessarily follows that other security, even though it does not exempt the treasurer from liability for the deposit, cannot be used by him for the protection of the latter."

The question before us was not decided by that Court, and the power of a national bank to pledge its assets as security for public funds under a statute similar to the one before us was not in issue. From the quotation above referred to, however, the Court said that the state treasurer still would be liable to the State on his bond because he had not followed the statute, and this means that he would not be released from his bond

because he was not authorized by the statute to do the thing that he did. The Court held, however, that the receiver would not be permitted to repudiate the contract as against the state, an innocent third party. On that phase of the question we do not choose to follow that case, but prefer rather to rely on the reasoning pertinent to that subject in *Baltimore & Ohio R. Co.* v. *Smith*, 56 Fed. (2d) 799.

Paragraph 374, *supra*, expressly provides that before any Illinois bank may receive a deposit of public funds, of the kind herein described, it shall execute a bond with sureties approved by the president of the city council, as security for the return of the money deposited; and it is not authorized to give, nor is the treasurer authorized to accept, other security. Any other construction would render the statute meaningless. In the present case no bond was given by the Bank, and the assets which were deposited in violation of the statute were neither approved by the president of the council, nor were they deposited with the city treasurer except in escrow and under joint control with the surety on the treasurer's original bond, and by these acts appellees hope to circumvent the express terms of the statute. These things neither the treasurer nor the Bank was authorized to do under the Illinois law and the Federal Act of June 25, 1930, *supra*.

Our attention has been called to *Pottorff* v. *El Paso-Hudspeth Counties Road Dist. of Texas*, 62 Fed. (2d) 498. In that case the appellee was organized under a special Act, which among other things, provided that the Treasurer or depository should be governed by the same laws as are provided for depositories of county funds; provided that before any such treasurer or depository should be entitled to receive any funds of the district, it should give bond to the district in amount equal to the funds deposited. Section 517a of the law of Texas relating to depositories of county funds, provided that no bank, or bank and trust company, except where specifically authorized by statute or except in the case of a deposit of public funds, should give preference to any depositor by pledging the assets of the corporation as collateral security. Instead of giving a bond to protect appellee's deposit, part of the bank's assets were pledged. Appellee contended that the statutes should be construed together and that with such construction the pledge was authorized and valid. This contention was sustained and the Court further said that aside from section 517a, ample authority was to be found in the other statutes relied upon, and in the general law. The other stat-

utes referred to were not cited. It will be remembered that the Illinois statutes contain nothing resembling the provisions relied upon in this case.

It may be urged that the equities surrounding the transaction should appeal even to a court of law in arriving at its conclusions on the ground that the pledge was made in good faith and with the approval of the board of directors; but it should also be remembered that the pledge in all probability was made in the absence of and without the knowledge of the unsecured depositors. It is quite obvious that the surety on the treasurer's bond is the moving spirit in this controversy, and it has a perfect right to be. It should neither be criticised nor penalized on account of that fact, but in speaking of equities it should be borne in mind that it voluntarily entered into the contract for which we assume that it received a cash consideration. It voluntarily assumed the risk of accepting a pledge of the assets of an Illinois bank, notwithstanding the fact that that State had granted neither express nor implied power to its banks to make such pledge. Under those conditions we think the surety is in no position to complain.

Appellees' contention that the receiver is without authority to maintain this action is without merit. *Baltimore & O. R. Co.* v. *Smith, supra; Wood* v. *Imperial Irr. Dist.*, 17 Pac. (2d) 128; *Austin* v. *Lamar*, 26 S. W. (2d) 1062. The receiver represents more than the insolvent institution. He also represents all the creditors of that insolvent institution. *Davis* v. *Gray*, 83 U. S. 216; *Franklin Nat'l Bank* v. *Whitehead*, 149 Ind. 560. It is true that ordinarily when two parties have entered into a contract which has been fully executed on both sides, one will not be allowed to set up the defense of *ultra vires* without making some sort of restitution. However, in such a case as has arisen here, there are other parties to be considered in addition to the two contracting parties, namely, the general depositors whose rights have been infringed by the action of the two contracting parties. Restitution would simply continue that wrong against innocent parties. Further, as was stated in *Balt. & O. R. Co.* v. *Smith*, and in *Wood* v. *Imp. Irr. Dist., supra*, there were two acts involved in the transaction under consideration, one, the deposit which was perfectly valid, and the other, the pledge which was invalid. It does not appear to us as worthy of judicial approval that the secured depositor may take advantage of the *ultra vires* act of the bank and assert an estoppel grounded upon such act. It had no right in making the deposit to rely upon a prefer-

ence in the form of an unlawful transfer of assets. Otherwise both parties, bound to realize the illegality of the transfer, might, in the face of such unlawfulness, agree to make the transfer, saying each to the other, "Though the transfer is not authorized by law, yet we will make it and accomplish the desired result despite its illegality, for neither may hereafter rescind without restoring the original status." We do not approve of the accomplishment of an illegal result by way of any such unconscionable use of the doctrine of estoppel. We hold with the decisions in the cases cited that the receiver may repudiate the invalid pledge without returning the valid deposit, and that appellees must share with the other general depositors in the distribution of the Bank's assets.

The judgment of the District Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ALSCHULER, *Circuit Judge,* dissenting. I do not concur in the holding that there is in Illinois a public policy against permitting banks to pledge assets for securing public deposits unless authorized by a statute. I believe that *Ward* v. *Johnson,* 95 Ill. 215, sufficiently indicates the view of the Supreme Court that public policy in Illinois is not opposed to such pledges. The case has been quite frequently cited in other jurisdictions to support the proposition that in Illinois such pledge of assets is not contrary to the state's public policy.

The recent case of *People ex rel. Nelson* v. *Peoples State Bank of Maywood,* 266 Ill. App. 330, while not in all respects like that at bar, in my judgment recognizes the binding force of such a pledge; and the reviewing decision of the Supreme Court of Illinois, in an opinion filed October 22, 1932, does not conflict therewith. However, upon the petition of both parties a rehearing has been granted, which at present writing is pending.

It is significant that in a state so commercially important as Illinois, where presumably there have been many such transactions not falling within the provisions of any statute, such pledges, if deemed contrary to the state's public policy, have not long since been denounced by its courts.

It is pointed out, in support of such a public policy of the state, that ordinarily there is secrecy in such pledges of which the general public has no notice, and that depositors not so secured would usually have no means of knowing how much of the bank's reported assets are so segregated.

It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks. I fully agree that banks should be required to make frequent public reports of their condition, and that in such reports it should be specifically disclosed what part of the reported assets is so pledged. To my mind it is a vicious practice to permit banks to advertise their "resources" at an amount inclusive of their total deposits, without requiring that at the same time, and quite as prominently, there be stated the liabilities to which the resources are subject.

It is also pointed out that such pledging of a bank's assets may, in case of the bank's threatened disaster, enable certain depositors to be favored as against others. This, of course, would bring into the picture collusion and probably fraud, which would be dealt with when it appears, but which is not involved here, where concededly there was no suggestion of circumvention or favoritism, and where, at the time of the pledge, the bank was solvent.

But if it may be said that the policy of the state, or even of the United States, is against such pledges, and that the giving of them was *ultra vires* the bank, another proposition arises which in my judgment would in any event require restoration of the deposits, made in good faith upon the ultimate security of the bank's pledge, before the bank or its representative may be permitted to take back the securities. The case of *State Bank, etc.* v. *Stone,* decided by the New York Court of Appeals February 28, 1933, specifically so decides. In that case it is held that, while the bank was without power to pledge assets to secure a "*private deposit,*" the receiver of the insolvent pledgor bank must pay back the amount of the deposit before he is entitled to a return of the pledged securities. In the case at bar it was the good faith deposit of the bank's securities that enabled the city's treasurer to procure a bond to protect the city against loss through any such deposit; and the bank or its receiver should not be permitted to withdraw the securities without making whole the depositor who, upon the faith of the pledge, deposited the funds in the bank. The bank itself could not properly urge its want of power to make the pledge, in support of its undertaking to recall the pledge, without first making good the deposit; and, as fully reasoned in the New York case, the rights of the receiver are not in this regard different from those of the bank itself if there were no receiver.

It is said that this rule would not apply because there is another party to the transaction, namely, the unsecured depositors and creditors of the bank. As to this contention the New York case is like this one, both having as the "third party" the unsecured depositors and creditors. Without further elaboration thereon I refer to that case and its discussion of the proposition.

In this connection I think it should be considered that in a pledge such as this one the bank's assets are not depleted. The deposit of the public funds made on the strength of the pledged assets becomes the property of the bank and gives to the bank, in additional cash assets, the substantial equivalent of the securities pledged.

But the opinion is further based on the conclusion that by the Illinois Commission Form of Government Act the city and its treasurer are disqualified from depositing, and the bank from receiving, deposit of city funds on any other terms than as the act prescribes, and the subsequent act of Congress referring to state laws specifies. This first act specifies that the city treasurer shall make daily deposits of receipts from all sources of revenue in one or more banks *situated in the city,* to be selected by the president of the council, the commissioner of accounts and the treasurer, or by any two of them, and that before deposit is made therein the bank shall be required to enter into an obligation with the said council to pay interest on deposits at a rate of not less than three per cent per annum, and shall execute bond, with sureties approved by the president of the council, conditioned that the bank will safely keep and account for said money.

These provisions prescribe the duties and direct the conduct of the treasurer and other city officers in the matter of depositing money, but in my judgment they are in no sense or degree a limitation upon the right of a bank to pledge its assets as security for deposits. If in making the deposit the treasurer does not comply with the statute, he may remain personally liable to the municipality for the safety of the deposit, but the act does not deny to banks the right further to secure the depositing municipality or its treasurer or his sureties, by pledge of assets, even though all the statutory requirements have been observed.

It is to be noted that only comparatively few Illinois municipalities are under the Commission Form act, and that the policy in Illinois of permitting the pledging of a bank's

assets as security for deposit of public funds continues to be applicable to those municipalities unaffected by the Commission Form act. I cannot conceive that by the Commission Form act it was intended to distinguish between the two classes of municipalities as to the right of banks to pledge their assets to make secure deposits of municipal funds. The act was in regulation of cities, not banks.

I am well satisfied that the general right of an Illinois bank to pledge its assets to secure deposits of public funds was not withdrawn by the Commission Form act, and that Illinois banks had and have the right to pledge their assets to secure deposits of municipalities under Commission Form of government, as well as of other municipalities.

But in the case of the city of Marion it is particularly to be noted that at this time there were no banks whatever in the city, and it was impossible to comply with the statutory mandate of selecting a bank of that city in which to deposit the city's funds. What then was to be done? Must the city and its treasurer assume the risk of thieves and fire and other perils by keeping the funds in physical possession for lack of express statutory authority to select a depositary elsewhere? In the opinion of October 22, 1932, in *People ex rel. Nelson* v. *Peoples State Bank of Maywood, supra,* it is said:

> "There was no necessity for a law or an ordinance authorizing the village treasurer to deposit the funds in his hands in a bank. That was customarily done. * * * We know of no case in this State in which the legality of the deposit of public funds by their custodian in a bank has been questioned. The reason, no doubt, is, that the practice has been universal and has been recognized as necessary."

The situation was one which evidently the statute did not contemplate, and to my mind the statute did not cover such a contingency and is therefore not applicable to this case. If the statute has no application to a situation such as this, the bank's power to pledge its assets to secure the deposit was not affected by it.

But, even if it were concluded that the Commission Form act had the effect of depriving Illinois state banks of the right to pledge their assets to secure deposits made by Commission Form municipalities, I am of opinion that the amended Act of June 25, 1930, 12 U. S. C. sec. 90 (1932

Supp.), was not intended to restrict or limit national banks in their theretofore quite generally recognized right to pledge their assets to secure deposits of public funds. While in many relations such security is specifically required by federal statute, I believe this act is no inhibition upon pledging assets to secure public funds in those instances where there is no such statutory requirement.

In providing by the Act of 1930 that national banks may give such security for the safe-keeping and payment of public funds as is authorized by the law of the state in which the national bank is located in the case of other banking institutions of the state, the national bank was placed upon the same footing in respect to bidding for public deposits as were the state banks, with which, quite naturally, they were in competition. Far from thereby withdrawing from the national bank the power it theretofore had to pledge its assets to secure deposits of public funds, the act was, in my judgment, an enlargement of its power, so that, in addition to a general right to pledge assets to secure such deposits, it thereafter had the right, notwithstanding any prior inhibition upon national banks from doing some or any of the things in that regard which might in some particular state be done by the banks thereof. The act was calculated to remove any doubt of the right of the national banks to be on the same footing as the state banks of the several states. An interesting side light in connection with the passage of this act appears in the margin.[3]

Instead of thereby withdrawing or restricting any right of national banks to pledge their assets to secure deposits of public funds, the act of Congress undertook only to remove

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[3] Referring to this legislation there appears in House Report No. 1657, 71st Congress, 2nd Sess., this letter from Acting Secretary of the Treasury Lowman to Committee Chairman McFadden:

"My dear Mr. Chairman: Reference is made to S. 486, 'An act to amend section 5153 of the Revised Statutes, as amended' which passed the Senate April 1, 1930, and which is now pending before the Committee on Banking and Currency of the House of Representatives.

"While the office of the Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safekeeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486."

whatever, if any, possible doubt of such right there might be in any of the states.

We have received copy of an opinion of the Indiana Supreme Court filed March 28, 1933, in *Schornick* v. *Butler,* referred to in note 2 of the opinion herein. The facts there are so like those here, and the discussion is so corroborative of the conclusions stated in this dissent, that I feel justified in commenting thereon.

The appellees, who were directors of a bank, became sureties on the bank's bond to the municipality for public funds which would be deposited in the bank by the municipality. In consideration of becoming sureties, the bank agreed with them that sufficient of its assets should from time to time be set aside and turned over to them as a collateral pledge to insure them against loss upon their bond as sureties. The bank (which the Circuit Court found to have been insolvent at the time the security agreement was made) went into receivership, and action upon the bond was brought by the municipality against the sureties, who thereupon demanded that the agreed collateral be turned over to them. This the receiver of the bank refused to do. Suit was brought by the sureties against the receiver to secure possession of the collateral, and the judgment of the Circuit Court found for the sureties.

The opinion affirming the judgment touches upon several of the propositions I have above considered. The opinion held it to be immaterial whether the assets were pledged directly to the municipality, or to the sureties upon the bond to the municipality for securing the deposit of its funds. It discusses the contention that the pledging of the bank's assets to secure deposits is contrary to public policy, and after some consideration of that question says:

> "We find no constitutional or statutory enactments, no practices of officials or judicial decisions in this state indicating that the pledging of collateral to secure deposits is against public policy. There is nothing inherently wrong or immoral in such a transaction. The only decision of this court upon the subject that we have found upholding such an agreement denies such a policy."

Respecting the equities of such a situation, and as bearing on the proposition that such pledges are *ultra vires* the bank and against public policy, the opinion states:

> "The bank parted with an interest in the securities equal to the deposit subject to the condition that, to the

extent to which it repaid the cash, it would reclaim the securities. It amounts to no more than a sale of securities at their actual value for cash. The general creditors of the bank lost nothing by the transaction, and, if they are affected at all, they are benefited since the bank is more liquid by reason of having the cash rather than the securities. The appellees gained nothing. The public deposit or its proceeds was used, or will be used, for the payment of general creditors of the bank. No more than an equal amount of the pledged notes will be withheld. The action sounds in equity. The general creditors of the bank or the appellant, their representative, cannot be heard to say that the pledging of the securities was illegal while they retained the benefits of the transaction. *Melaven* v. *Hunker, et al.* 299 Pac. 1075. It would be unconscionable to permit the general creditors to profit where they had no loss, at the expense of the appellees, who have profited nothing and have done no wrong. It must not be permitted unless there is some insuperable rule of law which requires it."

The court refers to the public depository law of Indiana, section 12621 (Burns' 1926) which requires banks receiving public deposits to give the municipality a bond to secure the same. Section 12622 provides that in lieu of such bond the bank may pledge specified classes of municipal bonds, or bonds of the United States or of the state of Indiana, to secure such deposits. The securities there agreed to be pledged were not such as the statute authorized a municipality to take, and were not given or to be given to the municipality itself; and so in that case, as in the case at bar, the pledge did not comply with the statute, and to sustain the pledge resort must be had to the general power of a bank to pledge its assets as security for such deposits. As to this the opinion says:

"Our Banking Law gives banks 'all the powers incident and proper, or which may be necessary and usual, in carrying on the business of banking.' The right of a bank to borrow money and pledge its assets for the payment thereof is beyond serious question. It is urged, however, that a deposit is not a loan and that banks have no power to pledge their assets to secure deposits. There is no reason for the distinction. In either case the relation of debtor and creditor is created. It has been expressly

held by this court that an agreement to assign collateral as security for a certificate of deposit will be enforced, and in answer to the contention that the transaction constituted an ordinary deposit and not a loan, the court said:

"'As to how it should be regarded in this respect, whether as a loan or a deposit, is not material under the facts in this case, for if it be considered as an ordinary deposit its effect would be to create the relation of debtor and creditor between appellee and appellant's bank.' *Harris et al.* v. *Randolph County Bank,* 157 Ind. 120.

* * *

"The Legislature recognized the right of a bank to pledge collateral to secure the payment of ordinary deposits when it enacted the depository law. An examination of the title and body of that Act clearly discloses that it was not intended to affect the powers of banks. It merely fixed the terms and conditions upon which public officers may make deposits in banks."

The Indiana statute respecting the general power of banks does not in essence differ from that of Illinois on the same subject. The Schornick opinion recognizes the *power* of banks to make pledge of its securities to secure deposits *of public or private funds;* and the opinion in the Harris case, *supra,* holds that in a private transaction involving an agreement to pledge the bank's assets as security it was immaterial whether the transaction was a loan to the bank or a deposit. Although some cases distinguish as between pledges to secure public and private deposits, and between deposits and loans, I can see no adequate reason for the distinctions. However, in my judgment those distinctions are not material here, where the deposit was of public funds.

The last above quoted paragraph indicates that the public deposit statute of Indiana, in specifying what security for deposits the municipality must require, did not affect the power of the bank to pledge assets, but "merely fixed the terms and conditions upon which public officers may make deposits in banks."

In another place, referring to the contended difference between a deposit and a loan to the bank, and its right to pledge for the latter and not the former, the opinion says:

"The basic contractual obligation to pay is the same and, if when the money is received the bank assigns col-

lateral as a guaranty of its repayment, we know of no rule or reason which would permit the collateral to be retained in one case and not in another.''

The note 2 refers to the unusual circumstance that in a prior opinion in the same case by the same court, filed July 3, 1930, and reported in 172 N. E. 181, conclusions were stated diametrically opposite to those announced in the later opinion. In the first opinion the Circuit Court was reversed; and, petition for rehearing having been granted, in the second judgment was affirmed.

The note also calls attention to the fact that in the interim the personnel of the court had changed, leaving on the bench only one of the five members who participated in the first opinion, and he dissenting therefrom. It is quite true that the first opinion was not unanimous (two dissenting therefrom). The materiality of this is not apparent, beyond indicating the likelihood that in each instance the case had the careful consideration of the court.

Whether tested by the laws and the public policy of the state of Illinois or of the United States, or of both, I believe this pledge of the bank's assets should be sustained; but that, in any event, an order directing return of the securities should be conditioned upon payment of the amount of the deposits to secure which, directly or indirectly, the securities were pledged.

And on the same day, to-wit: On the twenty-fifth day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
4784 *vs.*
City of Marion Illinois, Continental Illinois Bank and Trust Company, The Fidelity and Casualty Company of New York, and Ray Carroll, as Treasurer of the City of Marion, Illinois.

Appeal from the District Court of the United States for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

And afterwards, to-wit: On the fifteenth day of May, 1933, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to-wit: On the twenty-fourth day of May, 1933, there was filed in the office of the Clerk of this court an answer to the petition for rehearing, which said answer is not copied here.

And afterwards, to-wit: On the first day of June, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, June 1, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

4784 Ben Sneeden, etc. *vs.* City of Marion, *et al.* } Appeal from the District Court of the United States for the Eastern District of Illinois.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the third day of June 1933, the mandate of this court issued to the District Court of the United States for the Eastern District of Illinois.

And afterwards, to-wit: On the tenth day of June, 1933, there was filed in the office of the Clerk of this court a Stipulation to recall mandate, which stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1932.

No. 4784

Ben Sheeden, as Receiver of The City National Bank of Herrin, Illinois,
Appellant,
—*vs*—
City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation; The Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

Honorable
Fred L. Wham,
Judge Presiding.

STIPULATION.

It is hereby stipulated by and between the parties to the above entitled cause by their respective solicitors that the mandate which was heretofore issued herein may be recalled and stayed herein until the time for filing a petition for certiorari in the Supreme Court herein has expired without such a petition having been filed, or if such a petition be filed, until the same is denied, or if so filed and granted until the case is finally disposed of in the Supreme Court of the United States.

HOSEA V. FERRELL
JOHN HAY
Solicitors for Appellant.

C. E. POPE
H. F. DRIEMEYER
R. T. COOK
CARL MEYER
DAVID F. ROSENTHAL
RICHARD MAYER
Solicitors for Appellees.

June 9th 1933.

And on the same day, to-wit: On the tenth day of June, 1933, the following further proceedings were had and entered of record, to-wit:

Saturday, June 10, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Ben Sneeden, as Receiver, etc.
4784 *vs.*
City of Marion, *et al.*

Appeal from the District Court of the United States for the Eastern District of Illinois.

Now this day comes counsel for appellees and presents a motion for recalling and staying the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby recalled and stayed until the further order of this court.

It is further ordered that counsel for appellees proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 87 to 130, inclusive, contain a true copy of the proceedings had and papers filed, (excepting briefs of counsel, petition for rehearing and answer thereto) in the case of

Ben Sneeden, as Receiver, etc.,
Appellant,

vs.

City of Marion, Illinois, *et al.*,
Appellees.

No. 4784, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June A. D. 1933.

FREDERICK G. CAMPBELL
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following No. 128.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.